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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. OMAR ANTONIO LOPEZLOPEZ, Defendant and Appellant.	H045466 (Santa Clara County Super. Ct. No. C1770996)

Defendant Omar Antonio LopezLopez pleaded no contest pursuant to a plea agreement to second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)). The trial court suspended imposition of sentence and placed him on probation with numerous conditions. On appeal, defendant contends that the trial court erred when it ordered that his conviction be reported to the Department of Motor Vehicles (DMV) for imposition of a driving privilege revocation. We affirm the order.

I. Background

In July 2017, defendant drove to a gas station in San Jose, took gas and $936 from a clerk at gunpoint, and drove away.[1] In October 2017, he pleaded no contest to second degree robbery. The probation officer recommended, among other things: "13. The defendant be informed the Court must report this conviction to the State of California Department of Motor Vehicles (DMV) and the DMV must impose a driving privilege revocation as required by California Vehicle Code Section 13350."

At the sentencing hearing, defense counsel objected to the condition. This exchange followed: "[DEFENSE COUNSEL]: I don't think condition 13 applies because a vehicle was not used in the commission of the crime. Certainly it may have been used to leave the scene but I would submit that it was not used to commit the crime. [¶] . . . [¶] THE COURT: What say the People? [¶] [THE PROSECUTOR]: He drove a car to do that, to commit this robbery, Judge. I think it applies. Not only did he drive there, he also drove off away from there. [¶] THE COURT: Well, that logically makes sense. I mean, if a vehicle is used in the commission of a robbery, in the sense that it is used to drive to the location of the robbery and then drive away after the robbery is completed, the vehicle is used in the commission of a robbery, unless there is some other theory you have. [¶] [DEFENSE COUNSEL]: . . . My point would be that car was used for transportation, but it was not used to commit the crime that he's convicted of. [¶] . . . [¶] THE COURT: . . . I think the logical inference that can be drawn is that if you drive a vehicle to a 7-Eleven, rob 7-Eleven at gunpoint -- this is hypothetical -- then get in the car and drive away, that the vehicle was used in the commission of the robbery. That's the common sense inference I draw. [¶] . . . Can you tell me what the facts [of this case]

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[1] Since there was no trial and the probation report does not include the facts supporting the conviction, the facts are based on the complaint and the characterization of the offense at the sentencing hearing by the parties and the trial court.

were? [¶] [DEFENSE COUNSEL]: It's very similar to the Court's hypothetical. [¶] THE COURT: Well, then I think it applies."

II. Discussion

Vehicle Code section 13350 provides that the DMV "immediately shall revoke the privilege of a person to drive a motor vehicle upon receipt of a duly certified abstract of the record of a court showing that the person has been convicted of . . . [¶] . . . [a] felony in the commission of which a motor vehicle is used . . . ." (Veh. Code, § 13350, subd. (a)(2).)

Defendant contends that the trial court erred in finding that defendant's vehicle was used in the commission of the robbery. He relies on *People v. Poindexter* (1989) 210 Cal.App.3d 803 (*Poindexter*) in which the defendant pleaded no contest to grand theft from a person. (*Id.* at pp. 805-806.) In that case, the victim was stopped at the side of the road and fixing his car. (*Id.* at p. 806.) A car in which the defendant was the passenger stopped behind the victim's car. The driver, who was the codefendant, asked the victim where he got the "'bra'" on the front of his car. (*Ibid.*) The men eventually removed it from the victim's car and put it on the codefendant's car. They also demanded money from the victim. (*Ibid.*) During the encounter, the defendant pretended that he had a gun under his sweater and the codefendant ordered the victim to take speakers from his car. (*Id.* at pp. 806-807.) However, the speakers were damaged and the codefendant returned them to the victim. (*Id.* at p. 807.) The trial court found that "a vehicle . . . 'involved and incidental to' the offense" and ordered the DMV to suspend the defendant's driving privilege. (*Ibid.*)

The *Poindexter* court held that the trial court's order was erroneous. (*Poindexter*, *supra*, 210 Cal.App.3d at p. 808.) The Court of Appeal reasoned: "Neither party has cited any authority, and our research has revealed none, concerning the interpretation of

the phrase 'Any felony in the commission of which a motor vehicle is *used*' (italics added) in Vehicle Code section 13350, subdivision (a)(2). In construing the weapon use provision of Penal Code section 12022.5, the California Supreme Court has defined 'use' as follows: ' "Use" means, among other things, "to carry out a purpose or action by means of," to "make instrumental to an end or process," and to "apply to advantage." (Webster's New Internat. Dict. (3d ed. 1961).)' [Citation.]" Applying this definition, courts have held that mere possession of a firearm during the commission of a felony does not constitute a 'use' within the meaning of the statute. [Citations.] [¶] Likewise, in the context of Vehicle Code section 13350, the Legislature must have intended the term 'used' in the commission of a felony to mean that there was a nexus between the offense and the vehicle, not merely that a vehicle was incidental to the crime. Under this standard, the record does not show a sufficient connection between the vehicle and the crime to invoke Vehicle Code section 13350. The crime was not carried out by means of the car, nor was the car used as an instrumentality in the crime. [Citation.]" (*Poindexter, supra,* 210 Cal.App.3d at pp. 807-808.)

Other courts have found a sufficient connection between a defendant's vehicle and his or her crime. In *People v. Paulsen* (1989) 217 Cal.App.3d 1420 (*Paulsen*), the Court of Appeal distinguished the facts before it from those in *Poindexter*. The *Paulsen* court stated that "there was a strong nexus between the crimes perpetrated by defendant and the two motor vehicles in this case. Both the Isuzu car and the U-Haul truck were instrumental in carrying out the crimes charged. Their use was necessary in order to haul away the merchandise acquired in the fraudulent purchases. Defendant and her codefendant would not have been able to move the heavy musical and television equipment away from the stores where they obtained the merchandise without the use of such vehicles. Moreover, it appears that the use of these vehicles was a deliberate part of the two coconspirators' elaborate fraud scheme. We hold that the trial court did not err in

ordering defendant to surrender her driver's license pursuant to section 13350." (*Paulsen*, at p. 1423.)

In *In re Gaspar D.* (1994) 22 Cal.App.4th 166 (*Gaspar D.*), the minor entered the victim's car, removed the stereo, and left in another car. (*Id.* at p. 167.) When a police officer pulled the car over, he found a cassette tape belonging to the victim, burglary tools, and the victim's car stereo in the trunk. (*Id.* at p. 168.) The *Gaspar D.* court relied in part on two out-of-state cases to reach its holding: "In *Langfield v. Dept. of Public Safety* (1990 Minn.Ct.App.) 449 N.W.2d 738, a case factually similar to the instant one, the court considered whether a license was properly suspended under a statute similar to section 13350. The court affirmed, concluding: '[E]ven if appellant was not the driver, the vehicle was used to travel to the burglary scene, was used as a place from which to commit the crime, and was used to depart the scene after the attempted burglary.' (449 N.W.2d at p. 741; see also *Com., Dept. of Transp., Bu. of Traffic Safety v. Hull* (1980) 52 Pa.Commw. 334 [416 A.2d 581], and cases cited therein.)" (*Gaspar D.*, at p. 170.) The *Gaspar D.* court concluded: "We agree with the reasoning of *Paulsen*, *Langfield*, and *Hull* on these facts. We also agree with their conclusion that one purpose of the suspension legislation is to deter the use of motor vehicles in criminal endeavors. The legislation's purpose is not limited to concerns for the safety of the driving public. [¶] The court did not err in finding Gaspar used a vehicle in the commission of a felony and recommending his driving privilege be revoked. Aside from the use of the vehicle for transportation to and away from the chosen crime scene, there was use of the vehicle to conceal the fruits of the crime in the trunk. A sufficiently strong nexus between the vehicle use and the crime existed to apply section 13350." (*Gaspar D.*, at p. 170.)

In *People v. Gimenez* (1995) 36 Cal.App.4th 1233 (*Gimenez*), a sheriff's deputy saw the defendant getting out of a Camaro. The deputy made a U-turn, but the defendant had already left. The radio of the Camaro had been removed and placed on its front seat.

The defendant was then found in a parking lot near the Camaro and tools to remove the radio were in his truck. (*Id.* at p. 1235.) The defendant also admitted that he had removed the radio and that "he 'saw the radio—wanted it for himself and went back to get it that night.'" (*Id.* at p. 1237.) The *Gimenez* court distinguished these facts from *Poindexter* on the ground that the defendant had planned on taking the radio. (*Gimenez,* at p. 1237.) The court then concluded: "In accordance with *Gaspar D.*, we find that defendant used his vehicle for the purpose of committing the crime, and that the vehicle was instrumental, under these facts, in the commission of the crime, and that there was a sufficiently strong nexus between the vehicle use and the crime to justify the application of Vehicle Code section 13350." (*Ibid.*)

Here, defendant drove to a gas station, took gas and money from a clerk at gunpoint, and drove away. One can reasonably infer that defendant drove to the gas station with the intent to steal gas and left with the stolen gas and money in his vehicle. Given this record, the present case is distinguishable from *Poindexter* and factually similar to *Gaspar D.* Moreover, "'[t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) Since the robbery continued as defendant drove away in his car, defendant used his car for the purpose of committing the crime. Thus, there was a sufficiently strong nexus between the use of his car and the offense.

Defendant argues that "there is no rational legal basis to designate pre-planning a crime versus happenstance as the dividing line between keeping and losing a driver's license under a statute aimed at public safety on the roads." Even if we did not distinguish *Poindexter* on this basis, we would reach the same conclusion. Here, since defendant used his car to reach a place of safety, "[t]he crime was . . . carried out by means of the car . . . ." (*Poindexter, supra,* 210 Cal.App.3d at p. 808.)

III. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Danner, J.

People v. LopezLopez
H045466